MOSCOW NARODNY BANK LTD

v.

NGAN CHING WEN

FEDERAL COURT, KUALA LUMPUR
STEVE SHIM CJ (SABAH & SARAWAK)
ABDUL MALEK AHMAD FCJ
ABDUL HAMID MOHAMAD FCJ
[CIVIL APPEAL NO: 03-1-2003 (W)]
1 APRIL 2004

BANKRUPTCY: *Interest - Commencement date for interest - Whether claim barred by s. 6(3) Limitation Act 1953 - Decision of Federal Court in United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin*

CIVIL PROCEDURE: *Interest - Judgment debt - Commencement date for interest - Whether claim barred by s. 6(3) Limitation Act 1953 - Decision of Federal Court in United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin*

LIMITATION: *Interest - Arrears - Whether claim barred by s. 6(3) Limitation Act 1953 - Decision of Federal Court in United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin*

BANKRUPTCY: *Petition - Abuse of process - Creditor accepting payments from debtor after commencing bankruptcy proceedings - Whether payments constituted complete accord and satisfaction of debt - Whether merely part-payment of judgment debt - Whether acceptance of payments rendered bankruptcy proceedings an abuse of process*

The petitioning creditor ('appellant') had petitioned the judgment debtor ('respondent') for bankruptcy alleging that the respondent was indebted to the appellant for the sum of RM5,513,468.61. The senior assistant registrar dismissed the petition with costs, and subsequent appeals to the judge-in-chambers and the Court of Appeal were also dismissed. Upon further appeal, leave was granted to the appellant for the determination of two issues: (a) whether for the purpose of interpretation of the provisions of the second limb to s. 6(3) of the Limitation Act 1953, the date when interest becomes due under a judgment is to be taken as the date of judgment or the date of commencement of interest as stipulated in the judgment; and (b) whether acceptance of part-payment by a judgment creditor in the course of bankruptcy proceedings renders the proceedings an abuse of process despite indication by the judgment creditor

that such payments would be paid over to the official assignee in the event the debtor is adjudicated bankrupt upon the creditor's petition by reason of the absence of full settlement of the judgment debt. With regard to the second question, it was not disputed that RM504,816.20 was paid by the respondent and accepted by the appellant, and that the appellant undertook to pay it to the official assignee. What was disputed was whether it was paid and received as a complete accord and satisfaction of the debt.

Held (allowing the appeal):
Per Abdul Malek Ahmad FCJ

[1] Upon full analysis at the hearing of this appeal, the first question perhaps should not have been allowed as the Federal Court in the case of *United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin* had already decided that the date on which interest becomes due is the judgment date. (p 248 c)

[2] On the facts, there was no evidence that there was any accord or satisfaction or any attempt by the appellant to extract the debt payment from the respondent apart from the filing of the bankruptcy notice and the creditor's petition. It was always the respondent paying a certain sum of money to the appellant and asking that it be treated as a final settlement which was never agreed to by the appellant. Continuing with the bankruptcy proceedings despite the payments could not, therefore, be held to be an act of oppression on the part of the appellant. Therefore, the second question must be answered in the negative. (pp 250 b & 256 d)

Per Abdul Hamid Mohamad FCJ

[1] The date on which the interest became due was the judgment date (decision of the Federal Court in the case of *United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin* followed). (p 259 d)

[2] The appellant had filed the bankruptcy proceedings as a judgment creditor to recover the judgment debt owed to it. The fact that the respondent made the payment of RM504,816.20 subsequent to the filing of the bankruptcy proceedings did not in any way tarnish the intention of the appellant in commencing or even pursuing the proceedings as the appellant was of the view that it was only a part-payment of the judgment debt. Furthermore, the respondent had not raised the issue of abuse of process of the court in the High Court. Thus, merely accepting payments in the course of

bankruptcy proceedings does not render the proceedings an abuse of process, what more when the money is to be paid to the official assignee in the event the debtor is adjudicated a bankrupt. (p 264 a-c)

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Pemiutang mempetisyen ('perayu') telah mempetisyen penghutang penghakiman ('responden') untuk kebankrapan atas alasan bahawa responden telah terhutang kepadanya sebanyak RM5,513,468.61. Penolong kanan pendaftar menolak petisyen dengan kos, dan rayuan-rayuan kepada hakim-dalam-kamar dan Mahkamah Rayuan berikutnya juga ditolak. Ekoran rayuan selanjutnya, izin telah diberi kepada perayu untuk menentukan dua isu, iaitu: (a) sama ada bagi maksud pentafsiran peruntukan jejari kedua s. 6(3) Akta Had Masa 1953, tarikh di mana faedah menjadi terbayar di bawah suatu penghakiman adalah tarikh penghakiman itu dibuat atau tarikh permulaan faedah sebagaimana yang ditetapkan di dalam penghakiman; (b) sama ada penerimaan bayaran sebahagian oleh pemiutang penghakiman dalam tempoh prosiding kebankrapan menjadikan prosiding tersebut satu salah guna proses, walaupun terdapat petanda dari pemiutang penghakiman bahawa bayaran tersebut akan dibayar kepada Pegawai Pemegang Harta sekiranya penghutang dihukumkan bankrap di bawah petisyen pemiutang kerana gagal membayar sepenuhnya hutang penghakiman. Berhubung persoalan kedua, tidak dinafikan bahawa sebanyak RM504,816.20 telah dibayar oleh responden dan diterima oleh perayu, dan bahawa perayu juga telah mengakujanji untuk membuat pembayaran kepada Pegawai Pemegang Harta. Apa yang dipertikaikan adalah sama ada jumlah tersebut dibayar sebagai penyelesaian penuh hutang.

Diputuskan (membenarkan rayuan):
Oleh Abdul Malek Ahmad HMP

[1] Menganalisa sepenuhnya pendengaran rayuan ini, soalan pertama mungkin tidak sepatutnya dibenarkan oleh kerana Mahkamah Persekutuan di dalam *United Malayan Banking Corp Berhad v. Ernest Cheong Yong Yin* telah pun memutuskan bahawa tarikh di mana faedah menjadi terbayar adalah tarikh penghakiman.

[2] Berdasarkan fakta, tidak ada keterangan bahawa terdapat pembayaran penuh hutang atau apa-apa percubaan oleh perayu untuk mendapatkan bayaran hutang dari responden selain dari memfailkan notis kebankrapan dan petisyen pemiutang. Hanya responden yang sentiasa membayar sejumlah wang kepada perayu sambil meminta supaya ianya dianggap sebagai

penyelesaian penuh yang mana tidak pernah dipersetujui oleh perayu. Meneruskan dengan prosiding kebankrapan dalam kewujudan bayaran-bayaran tersebut tidak boleh, dengan itu, dirumuskan sebagai satu perbuatan menindas oleh perayu. Persoalan kedua dengan itu harus dijawab secara negatif.

Oleh Abdul Hamid HMP

[1] Tarikh di mana faedah menjadi terbayar adalah tarikh penghakiman (keputusan Mahkamah Persekutuan dalam kes *United Malayan Banking Corp Berhad v. Ernest Cheong Yong Yin* diikuti).

[2] Perayu telah memfail prosiding kebankrapan sebagai pemiutang penghakiman bagi mendapatkan jumlah yang terhutang kepadanya. Fakta bahawa responden membuat bayaran sebanyak RM504,816.20 selepas pemfailan prosiding kebankrapan tidak sedikit pun menjejaskan hasrat perayu dalam memulakan ataupun meneruskan prosiding kerana perayu berpendapat bahawa ia hanyalah bayaran sebahagian hutang penghakiman. Lagi pun, responden tidak membangkitkan isu salah guna proses mahkamah di Mahkamah Tinggi. Oleh itu, semata-mata menerima bayaran semasa prosiding kebankrapan masih berjalan tidaklah menjadikan prosiding itu suatu salah guna proses, sementelah jika bayaran tersebut akan dibayar kepada Pegawai Pemegang Harta sekiranya penghutang dihukumkan bankrap.

Rayuan dibenarkan.]

Case(s) referred to:

In re Majory [1955] Ch 600 ***(refd)***

Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 CA ***(refd)***

Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia [1999] 2 CLJ 471 FC ***(foll)***

Re Chong Ah Kwan Construction Co [1966] 2 MLJ 39 ***(refd)***

Re Darshan Singh Atma Singh, ex p OCBC Bank (Malaysia) Bhd [1996] MLJU Lexis 1195 ***(refd)***

Re A Debtor (No 757 of 1954), ex p The Editor v. RA Damont Ltd [1955] 2 All ER 65 ***(refd)***

Re Fong Yuan Kwong, ex p Public Bank Bhd [1996] 4 MLJ 42 ***(refd)***

Re Fredericke and Whitworth, ex p Hibbard [1927] 1 Ch 253 ***(refd)***

Re Hussain Manaf, ex p Malayan Banking Bhd [2001] MLJU Lexis 781 ***(refd)***

Re Loh Kok Huah, ex p Ban Hin Lee Bank Bhd [1991] 3 CLJ 1817; [1991] 3 CLJ (Rep) 183 HC ***(refd)***

Re MSA Zachariah, ex p Boon Siew [1993] 3 CLJ 279 HC ***(refd)***

Re Patel (a debtor) [1986] 1 All ER 522 ***(refd)***

Re Saloma Co, ex p Ipoh Radio Co [1963] 29 MLJ 46 ***(dist)***
Re Sharifah Mohsin, ex p Perwira Habib Bank Malaysia Bhd [1994] 3 CLJ 373 HC ***(refd)***
Rozenbes & Ors v. Kronhill & Anor 95 CLR 407 ***(refd)***
Rozila Mohamed v. American Express (M) Sdn Bhd [1999] MLJU Lexis 959 ***(refd)***
Sababumi (Sandakan) Sdn Bhd v. Dato' Yap Pak Leong [1998] 3 CLJ 503 FC ***(refd)***
Tara Chand v. Jugal Kishore [1924] Vol 83 Indian Cases 967 ***(refd)***
Thomas v. Marconi's Telegraph Co Ltd [1965] 2 All ER 598 ***(refd)***
United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin [2002] 2 CLJ 413 FC ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 25(2)
Limitation Act 1953, s. 6(3)
Rules of the Federal Court 1995, rr. 47(4), 57(1), (2)

Bankruptcy Act 1883 [UK], s. 4(1)(g)

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 3(2), para 185

For the appellant - Leong Wai Hong (Claudia Cheah); M/s Skrine & Co
For the respondent - Sulaiman Abdullah (KK Yeow & Thaiyub Khan); M/s Thaiyub Khan Othuman & Co

[Appeal from Court of Appeal, Civil Appeal No: W-03-6-1996]

Reported by Suresh Nathan

JUDGMENT

Abdul Malek Ahmad FCJ:
Judgment for the sum of RM5,513,468.61 had been entered against the respondent on 19 November 1987 and the bankruptcy notice dated 4 June 1992 was duly served on the respondent on 3 November 1992. The creditor's petition was served on the respondent on 1 September 1993. Notice to oppose the creditor's petition filed on 23 May 1994 was served on the appellant on 2 June 1994.

On 23 June 1995, the learned senior assistant registrar dismissed the creditor's petition with costs. Since there were no grounds of judgment by the learned senior assistant registrar, the learned High Court judge proceeded to hear the appeal as if it were a retrial. The appeal to the judge in chambers was dismissed with costs on 20 December 1995, mainly because the creditor's petition had lumped the principal amount with accumulated interest for more than six years calculated backwards from the date the bankruptcy notice was dated.

This is evident from what was stated by the learned High Court judge at p. 17 of his judgment:

> But since the interest item has formed an integral part of the total amount, inseparable from the principal sum as well as other subsequent claim (sic) on interest not affected by the Limitation Act due to the nature of a running account as stated in the particulars as set out in the Banks (sic) Notice and the Petition, the entire claim of the Petitioning Creditors as stated in the Bankruptcy Notice and Petition is therefore unenforceable.

Subsequently, the appeal to the Court of Appeal was dismissed on 20 July 1999 with no order as to costs. However, the grounds of judgment of the Court of Appeal only became available on 1 October 2001.

On 7 July 2003, the court granted the appellant leave to appeal on the following two questions:

> (a) whether for the purposes of interpretation of the provisions of the second limb to section 6(3) of the Limitation Act 1953 the date when interest became due under a judgment is to be taken as the date of judgment, or the date of commencement of interest as stipulated in the judgment;
>
> (b) whether acceptance of part payment by a judgment creditor in the course of bankruptcy proceedings renders the proceedings as abuse of process despite indication by the judgment creditor that such payments would be paid over to the official assignee in the event the debtor is adjudicated bankrupt upon the Creditors Petition by reason of the absence of full settlement of the judgment debt;

On 28 October 2003, the respondent filed a motion asking for the appeal to be dismissed pursuant to the inherent jurisdiction of this court or alternatively pursuant to para. 11 of the Schedule to, read with s. 25(2) of, the Courts of Judicature Act 1964 (hereinafter "the CJA"), or alternatively for the appeal to be permanently stayed, with costs on the ground that the appellant had filed a fresh bankruptcy notice on the respondent on 16 November 1999 which, on the respondent's application, was set aside by the learned senior assistant registrar on 12 October 2000. At the time of hearing of this appeal, the appeal to the judge in chambers against that order of the learned senior assistant registrar was still pending. It is the contention of the respondent that there has been a multiplicity of proceedings as both bankruptcy proceedings are founded on the same judgment.

The supporting affidavit also alleges that the bankruptcy notice the second time around was not in accordance with the judgment because the appellant is a Singapore based company with no place of business in Malaysia, the appellant cannot be carrying on a business within the premises of the appellant's solicitors, and that nowhere is it stated in the bankruptcy notice that the appellant's solicitors had authority to receive payment and to issue a receipt and discharge on the appellant's behalf.

We decided to hear the appeal and motion together.

As for the first question, it appears to be different from the question posed at the leave stage in the earlier case of *United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin* [2002] 2 CLJ 413 dated 5 April 2002. The question then was:

> What was the proper construction of s. 6(3) of the Limitation Act 1953 ('the Act'), in respect of the second limb, that is, 'No arrears of interest of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due'?

Writing the judgment for the court in that case, I had said at pp. 426-427 of the report that:

> Having studied *Lowsley & Anor v. Forbes (t/a LE Design Services)* [1998] 3 All ER 897 case carefully, we are persuaded to review the finding in the *Malaysian Soil*'s case as regards the maximum period arrears of interest can be claimed. It was decided then that the interest can go on for more than six years from the judgment date but having reconsidered the matter in the light of *Lowsley*'s case and the word 'arrears', it is now our opinion that when the act of recovery is made, future interest cannot be said to be in arrear and, therefore, cannot be claimed. The decision in the *Malaysia Soil*'s case would have been correct if the words used were 'no interest' and not 'no arrears of interest'.
>
> On these considerations, we would hold that it is obvious that the second limb of s. 6(3) of the Act provides that an action to recover arrears of interest must be brought within six years of the judgment date and because of the word 'arrears', it cannot denote interest which is still not due. It must, therefore, mean arrears of interest at the time of recovery and cannot include future interest even if the amount due has not been paid. We would, therefore, agree with the finding in *Lowsley*'s case.
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> Thus, a person filing an action for recovery of arrears of interest on the last day of the six year period from the judgment date is only entitled to that amount and nothing more. If he files it on the first day after the six year period, his action is barred by limitation, arrears of interest included.

When this matter came up at the leave stage on 7 July 2003, which was some fourteen months later, I was again on the panel but the question was phrased in such a different way that I personally felt it was a different problem. The first question posed in this appeal seeks to ask when is the date the interest becomes due. Is it the judgment date or the date of commencement of interest as stipulated in the judgment? In the *Ernest Cheong* appeal, the emphasis was on the non recovery of arrears of interest after six years from the date on which the interest became due.

Upon full analysis at the hearing of this appeal, I now realise that maybe the question should not have been allowed as in deciding the question in the *Ernest Cheong* appeal, this court had to decide when is the date the interest becomes due. It was accordingly decided that it was the judgment date. In fact, the way the question was worded here, with the words "to be taken as", suggests as a first alternative that the date the interest became due under a judgment becomes the date of judgment. This was in fact the finding already made in the *Ernest Cheong* appeal.

The second question pertains to the acceptance of part payment by the judgment creditor in the course of bankruptcy proceedings and whether it renders the proceedings an abuse of process. But before we answer that, it is relevant to consider the issue of accord and satisfaction first.

The judgment of the learned High Court judge on this point states at p. 13:

> After perusing the documentary evidence annexed to the respective affidavits of the parties, this Court finds no agreement was ever reached between the Debtor and the Petitioning Creditors to treat the payment of US$200,000.00 as a full and final settlement of the judgment debt. The Debtor's offer was never accepted by the Petitioning Creditors prior to the Debtor making the payment of US$200,000.00. If the Petitioning Creditor had agreed to accept such an offer of the Debtor previously, the Debtor would not have ended his same letter of offer with a request to the Petitioning Creditor for; "Please confirm by fax the aforesaid arrangement is agreeable to you." Such a request was not necessary if an agreement had been reached, and such an act can only imply otherwise especially when the Petitioning Creditor never responded to this request.
>
> Following from the above, the Debtor on 21 February 1994 made another offer of US$350,000 in full and final settlement of the judgment sum. This again is obvious to indicate that his previous offer was not received with agreement from the petitioning creditor, otherwise, if it had, there was no necessity to tender this second offer.

The Court of Appeal, however, had a different view. It said:

> There remains one further matter. The sole ground on which the respondent resisted the petition was that there had been a complete accord and satisfaction of the debt on which the bankruptcy proceedings were based. The appellant complains that the learned judge found for the respondent on the point without sufficient investigation of the facts. I think that there is much force in this argument. There may or may not have been an accord and satisfaction as alleged by the respondent. It is an issue that called for resolution in other proceedings properly brought by the respondent. The judge ought not, in my view, have expressed any concluded view on this issue in the absence of cogent evidence.

It is certainly not correct for the Court of Appeal to say that the learned High Court judge found for the respondent on the point as can be seen by the finding of the learned High Court judge in the preceding paragraph. In any case, there was enough cogent evidence from the correspondence for the High Court judge to come to that conclusion.

The Court of Appeal then went on to say:

> However, in the state of the evidence before him, the learned judge would have been perfectly entitled to dismiss the petition on the ground that it was an abuse of process. The appellant's own evidence warranted this. It is clear that the appellant had accepted payments from the respondent after commencing bankruptcy proceedings. The totality of the circumstances reasonably supports the inference that the appellant was using the bankruptcy court to extract payments from the respondent. That in my judgment amounts to an abuse of the bankruptcy jurisdiction of the High Court. The bankruptcy jurisdiction of the High Court is invoked on the ground that a debtor has committed an act of bankruptcy. The object of the exercise is to take the debtors financial affairs out of his hands and place them in the hands of the Official Assignee. It is certainly an abuse of process to use bankruptcy proceedings in the way of a judgment debtor summons to extract periodical payments from the debtor.

Again, this cannot be correct as the learned High Court judge had dimissed the appeal purely on the miscalculation of the interest in the bankruptcy notice and the creditor's petition.

The Court of Appeal made a further error when it said:

> In my judgment, the learned judge's decision is entirely correct and is supportable on the additional ground that I have adverted to a moment ago. It is true that the appellant is prejudiced by the finding made by the learned judge that there had been a complete settlement. But that is easily remedied by setting aside that part of the judgment and granting the parties liberty to institute appropriate proceedings to have that issue determined.

It is obvious, as seen earlier, the learned High Court judge never made a finding that there had been a complete settlement.

The Court of Appeal relied on *Jasa Keramat Sdn. Bhd. & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533 where the facts are quite distinguishable being a housing development contract and not one relating to bankruptcy proceedings. In any case, on the facts presented in this case, I would agree with the learned High Court judge as I cannot find any evidence that there was any accord or satisfaction or any attempt by the appellant to extract the debt payment from the respondent apart from the filing of the bankruptcy notice and the creditor's petition.

The following authorities certainly support this contention.

Re A debtor (No. 757 of 1954), Ex parte The Debtor v. F. A. Dumont, Ltd. [1955] CA Vol. 2 65 had propounded the following propositions:

(a) there is no hard and fast rule that any arrangement or agreement made by a petitioning creditor with his debtor, after the institution or under the shadow of bankruptcy proceedings, whereby the creditor is able to get more than that "to which he was legally entitled" (that is, more than he could have recovered at law at the time of the bankruptcy proceedings being started or threatened) amounts to extortion in bankruptcy law, notwithstanding the absence of any mala fides or anything amounting to oppression in fact;

(b) there is equally no rule that extortion has, in bankruptcy law, a special and artificial significance divorced altogether from the ordinary implication of the word;

(c) the so-called "rule" in bankruptcy is no more than an application of a more general rule that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and, therefore, disqualified from invoking the powers of the court by proceedings which he had abused;

(d) on the other hand the court will always look strictly at the conduct of a creditor using or threatening bankruptcy proceedings; and, if the court concludes that the creditor has used or threatened the proceedings at all oppressively (for example in order to obtain some payment or promise from the debtor or some other collateral advantage to himself properly attributable to the use of the threat), the court will not hesitate to declare the creditor's conduct extortionate and will not allow him to make use of the process which he has abused;

(e) in every case it is a question of fact in all the circumstances of the case whether there has been, in truth, extortion.

In *Tara Chand v. Jugal Kishore* [1924] Vol. 83 Indian Cases 967, the court ruled that the mere fact that payments have been made to the creditors of an insolvent between the filing of the petition for insolvency and the hearing, is not a ground for dismissing the petition. In *Re Loh Kok Huah, ex p Ban Hin Lee Bank Bhd* [1991] 3 CLJ 1817; [1991] 3 CLJ (Rep) 183, it was held that even where the judgment debt on which the creditor's petition was founded had by the date of hearing of the petition been substantially reduced, the court could still make a receiving order unless the judgment debt was less than the statutory minimum. This was followed in *Re Fong Yuan Kwong, ex p Public Bank Bhd* [1996] 4 MLJ 42.

In *Rozenbes v. Kronhill* [1956] 95 CLR 407, it was decided that there is an abuse of process if a pending bankruptcy petition or a threat of proceedings in bankruptcy is used as a means of extortion. The court will look strictly at the conduct of a creditor using or threatening bankruptcy proceedings and extortion may be held to have taken place if the creditor has used, or attempted to use, a pending petition, or threat of a petition, in order to extract from the debtor money which the debtor is not bound to pay or in order to obtain some secret and unfair advantage over other creditors. But extortion will not be held to have taken place "in the absence of mala fides or anything amounting to oppression in fact". There must be a real intention on the part of the creditor to use the process for some other end than its legitimate end and there must be a real exertion of pressure.

In fact, in *Re Fredericke and Whitworth ex parte Hibbard* [1927] 1 Ch. 253, it was held that a creditor who has served a bankruptcy notice which has not been complied with is not precluded from issuing and serving a second notice in respect of the same debt and the existence of an available act of bankruptcy does not excuse the debtor from compliance therewith.

Learned counsel for the respondent argued that bankruptcy is the most tedious consequence of civil law and the courts have taken the hardest line possible as regards the technical requirements from the bankruptcy court to the appellate levels. Accordingly, he stressed, no argument can be dismissed as being too technical.

He then referred to the relevant orders where the interest rate is given as nine and a half per cent but the bankruptcy notice states ninety two per cent. Furthermore, the respondent had been asked to pay at the appellant's solicitors' firm.

At this juncture, learned counsel for the appellant interrupted to say that this was not a reply and was not the submission made at all previous levels. In any case, he said, it was prejudicial to the appellant as it should have been done at the leave stage.

Learned counsel for the respondent explained that he was merely laying the groundwork to submit on the oppression and referred to paras. 9, 10, 11 and 12 of the supporting affidavit to the motion filed which are reproduced here for effect:

> 9. I am further advised by my solicitors and verily believe that based upon the current bankruptcy law and civil procedure, it is wrong for the Appellant to initiate 2 simultaneous bankruptcy proceedings against me, both of which are founded upon a single judgment.
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> 10. The bankruptcy proceedings vide Bankruptcy No. D4-29-3629-1992 and Bankruptcy No. D4-29-4384-1999, both prosecuted simultaneously, have occasioned a "multiplicity of proceedings". By reason thereof, the Appeal herein is an abuse of the court process and is also vexatious and oppressive.
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> 11. I am advised by my solicitors and verily believe that to pursue both this appeal and the proceedings arising out of the second notice renders the motive of the Appellant suspect. The motive is to embarrass me and such conduct is oppressive.
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> 12. I further aver that apart from the appeal herein, there are two (2) other matters *vide* Suit No. D4-(D8)-22-234 of 2001 in the High Court at Kuala Lumpur, where summary judgment for USD5,162,837-32 was entered on 01/08/2000. An appeal is now being filed in the Court of Appeal. The second matter is in the Court of Appeal No. W-02-1094-2201, where a judgment for S$1,555,842.46 was registered in the High Court at Kuala Lumpur against me, which resulted in the appeal to the Court of Appeal. Messrs. Skrine are the solicitors acting for the plaintiff/respondent in both these matters.

He cited *In Re A Debtor, No. 305 of 1911* [1911] 2 KB 718 where it was decided that a bankruptcy notice which requires the debtor to pay the judgment debt to the judgment creditors "or their solicitors" and which contains a statement by the solicitors that they are authorized by the creditors to receive payment and to act for them in respect of all matters specified in the notice, is not a bankruptcy notice "requiring the debtor to pay the judgment debt in accordance with the terms of the judgment" within s. 4, sub-s. 1(g), of the Bankruptcy Act 1883, and is consequently not a good foundation for a receiving order.

However, Cozens-Hardy M.R., who was also in the panel of the case cited in the preceding paragraph, explained the position in *In Re A Debtor (No. 1838 of 1911)* [1912] 1 KB 53. This was where a French firm had obtained a final judgment against the debtor, who resided in England, and had served upon him a bankruptcy notice requiring him to pay the amount due on the judgment to the creditors or one or either of them carrying on business at the address of the firm in Paris. It was held that the notice was bad, for it required the debtor to pay the judgment debt without the jurisdiction of the court and was therefore not "in accordance with the terms of the judgment" under s. 4, sub-s. 1(g) of the Bankruptcy Act 1883. He said:

> The solicitors had no implied authority of course to receive money for their clients, and the fact that the solicitors made a demand under the notice, "I tell you I have a power of attorney, please pay me," was not in our view a compliance with the Act. The judgment required payment to the plaintiffs, and it was not in compliance with the Act for the notice to require payment to the plaintiffs, or their solicitors, who certified, without any other proof, that they had authority to receive it. But so far from deciding that a notice to pay the plaintiffs in the action following the form of the judgment would not be sufficient if payment was directed to be at a particular address where there was an authorized agent to receive it, I think the contrary was in terms asserted. I say, on p. 723, "Payment to any member of the firm would be a good discharge, it being a firm debt." But why would it be a good discharge? Simply because according to the general law, now statutory law, under the Partnership Act, each partner is an agent for the firm, and therefore by ordering payment to the firm at a particular address, one member of the firm being there, he is competent to receive the money and to give a discharge as agent for, and so to bind, the firm. Not only is that so, but the very point raised here was decided by this Court in March of this year in the case of *In re Persse* 55 Sol. J. 314. In *In re Persse (supra)* the petitioning creditor was a house master at Winchester. Persse owed him some money. Judgment was obtained. The house master had two addresses, his house at Winchester, and a cottage where he was to be found in the vacation. He only gave the Winchester address in the notice. He was not at the Winchester address during the seven days, but it was proved that he had his butler there, who had authority during that time to receive the amount payable by the defendant, the judgment debtor, to him, and the Court of Appeal there held that that was a good compliance with the statute. It really seems to me it would not be open to us, having regard to the decision in *In re Persse (supra)*, to accept the proposition which has been strenuously argued before us by the respondents to this case, that payment to an agent is not payment to the principal within the meaning of this section.

> I think, therefore, no difficulty whatever need arise in the case of foreign creditors. They have only to say, in the words of the bankruptcy notice, "Pay me the proper amount at some address in London," and to have at that address a duly constituted and proper agent duly authorized to receive payment on behalf of the plaintiff. I only mention that because it is quite obvious that the recent decision in *In re a Debtor* [1911] 2 KB 718 has been misunderstood. In my opinion this appeal must be allowed on the first point and with the usual consequences.

With the same view, Fletcher Moulton LJ said:

> I fully agree also with the Master of the Rolls that it is important for us to take notice of the decision in *In re a Debtor (supra)* and explain it, because it has clearly been misunderstood. In my opinion that decision did not intend in any way to interfere with what had already been laid down by this Court, namely, that it is sufficient that at the address given there should be an agent properly authorized to receive payment of the money and to give a discharge for the debt. That had been laid down in *In re Persse (supra)*, and I am certain there never was any intention on the part of this Court to depart from that decision. The objection to the bankruptcy notice in the case of *In re a Debtor (supra)* was that in one part of it the debtor was directed to pay to the solicitors of the judgment creditors, not to the judgment creditors themselves, and there was an assurance on the bankruptcy notice, signed by the solicitors, to the effect that they had authority to receive. Nothing more than that was before the Court, and in my opinion the Court was quite justified in saying that it was not a proper bankruptcy notice. But I think that if the bankruptcy notice had said "Pay me at Messrs. Spyer & Son's," and Messrs. Spyer & Son possessed a power of attorney entitling them to receive the money for the judgment creditors, the decision would probably have been the other way. The decision turned entirely on the special facts of that case, and it was not intended to throw any doubt whatever on the power of the judgment creditor to arrange that the receipt of the debt shall be by a properly authorized agent at the address given. For these reasons I think this appeal must be allowed with the usual consequences.

Similarly, Farwell LJ concluded his judgment in the following manner:

> Then the second point urged was that we are bound by the recent decision in *In re a Debtor (supra)*. In my opinion that case decides simply this, and I am taking the last sentence of the judgment of the Master of the Rolls: "This is a matter which is technical beyond almost anything else in the proceedings at the present day, and the question is whether a bankruptcy notice can be right which departs so far from the authorized form and from the judgment itself as to say 'pay over to me or to a gentleman who says he is my solicitor.'" I can find no foundation for the argument that that was a decision that a creditor cannot demand payment to his duly authorized agent.

> The natural course for the foreign creditor to take is to direct the debtor to pay to him at the office of the person who is authorized to receive it, and when the debtor attends there to pay, he will be met by the duly authorized agent of the creditor, who will produce his power of attorney. It seems to me perfectly simple. It was decided, on an extreme technicality, that the notice in *In re a Debtor (supra)* was bad, but that case does not lay down any general rule. I therefore agree that this appeal should succeed.

As for the accord and satisfaction, learned counsel for the respondent questioned why the payment by the respondent was accepted if there was no settlement and no subsequent withdrawal of proceedings. By receiving the money and still proceeding with the matter, he argued, it was an act of oppression. Bankruptcy, he added, should be final step and not the first move. He said as the money being held in favour by the official assignee was only from the date the petition to oppose was filed, the facts postulated in the second question did not arise.

In reply, learned counsel for the appellant reiterated that matters raised by learned counsel for the respondent were not raised at earlier levels and it was unfair to the appellant.

In *Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia* [1999] 2 CLJ 471, the question of law for the decision of the Federal Court was: 'What sort of dispute is envisaged by s. 9(1A) of the Act? Must it be a dispute between employer and employee only?' At the hearing, however, the submissions advanced by the parties were not confined to the threshold jurisdiction point but were wide ranging and raised questions of law and fact along the same lines as those advanced in the courts below. In particular, counsel for the respondent argued that in arriving at his decision, the Minister had acted irrationally and illegally and in excess of jurisdiction by failing to take into consideration various relevant factors both of law and fact enumerated in the affidavit by the General Secretary of the Association of Bank Officers, Peninsular Malaysia (hereinafter "ABOM").

It was held that as a matter of principle, there could be no jurisdiction whatsoever for depriving a respondent to an appeal of his general right to take any point open to him in order to hold his judgment. Thus, it was open to ABOM to raise points outside the scope of the issue in respect of which leave to appeal had been given in order to hold their judgment following *Thomas v. Marconi's Telegraph Co Ltd* [1965] 2 All ER 598 and distinguishing the facts in *Sababumi (Sandakan) Sdn Bhd v. Dato Yap Pak Leong* [1998] 3 CLJ 503. Furthermore, notwithstanding *Sababumi*, having regard to rr. 47(4), and 57(1) and (2) of the Rules of the Federal Court 1995, the Federal Court has the

power and therefore the discretion to permit an appellant to argue a ground which falls outside the scope of the questions regarding which leave to appeal had been granted in order to avoid a miscarriage of justice.

In view of the motion, therefore, it is my finding that learned counsel for the respondent should not be shut out from raising ancillary issues which we consequently gave our due consideration.

The question of directing the payment to the appellant's solicitors, as can be seen from the authorities cited, is a non-issue. Having scrutinized the relevant orders, I would that say the ninety two per cent alleged by learned counsel for the respondent is actually the result of the superimposition of the figures for nine and a half per cent, which is the agreed interest rate.

As for the issue of accord and satisfaction, as stated earlier, I see no reason to disagree with the finding by the High Court that there was none despite the persistent claims of the respondent. It was always the respondent paying a certain sum of money to the appellant and asking that it be treated as a final settlement sum which was never agreed to by the appellant. Continuing with the bankruptcy proceedings despite the payments cannot, therefore, be held to be an act of oppression on the part of the appellant. The second question must therefore be answered in the negative.

In these circumstances, I would dismiss the motion with no order as to costs and allow the appeal with costs here and below and make the necessary receiving and adjudication orders against the respondent. The deposit is refunded to the appellant. All monies paid by the respondent to the appellant are to be paid to the official assignee within two weeks of this order.

Abdul Hamid Mohamad FCJ:

The petitioning creditor (appellant in this court) had petitioned the judgment debtor (respondent in this court) for bankruptcy alleging that the respondent was truly indebted to them for a sum of RM5,513,468.61. The senior assistant registrar dismissed the petition with costs. Appeal to the judge-in-chambers was also dismissed with costs. Appeal to the Court of Appeal was also dismissed with a slight variation to the judge's order. On 7 July 2003 this court granted leave to the appellant for the determination of two issues:

(a) Whether for the purpose of interpretation of the provisions of the second limb to s. 6(3) of the Limitation Act 1953 the date when interest became due under a judgment is to be taken as the date of judgment, or the date of commencement of interest as stipulated in the judgment;

(b) Whether acceptance of part payment by a judgment creditor in the course of bankruptcy proceedings renders the proceedings an abuse of process despite indication by the judgment creditor that such payments would be paid over to the official assignee in the event the debtor is adjudicated bankrupt upon the creditor's petition by reason of the absence of full settlement of the judgment debt."

About two weeks before the date fixed for the hearing of this appeal, the respondent filed a notice of motion for an order that the appeal be struck out or be stayed permanently mainly on the ground of multiplicity of proceedings. This is because, subsequent to the filing of the bankruptcy proceedings from which this appeal arises, the appellant had filed another bankruptcy notice allegedly based on the same judgment. We decided to hear the appeal because, on my part, the respondent had in fact applied for an order to strike out the second bankruptcy notice and an order had been made by the senior assistant registrar to that effect. The appellant had appealed to the judge-in-chambers against that order and the appeal is still pending. The second proceedings, in my view, does not in any way affect the hearing and disposal of this appeal. Indeed, the disposal of this appeal will determine the fate of the second proceedings. This is because, if the decision favours the appellant, the second proceedings becomes superflous. In any event, as it stands, the second proceedings stands struck out. This appeal concerns the first proceedings. If there is an abuse of process of the court on the ground put forward in the notice of motion, it is the second proceedings, not the first.

Coming back to this appeal, to appreciate the discussion on the two issues, I shall briefly narrate the facts.

The appellant obtained a judgment against the respondent on 19 November 1987. The judgment, as amended, reads:

> IT IS THIS DAY ADJUDGED that the Defendant (respondent in this court – added) to pay the Plaintiffs (the appellant in this court – added) the sum of US1,755,000.00 (United States Dollars One Million seven hundred and fifty five thousand) together with interest thereon at the rate of 9½% per annum from 22nd day of March 1986 to the date of realisation and $350.00 (Ringgit Three hundred and fifty) costs.

On 4 January 1992, the bankruptcy notice was issued. The particulars of indebtedness show an outstanding principal sum of RM4,403,295 derived from the judgment order. As regards the interest due on the principal sum, it was calculated from 22 March 1986 as stated in the judgment. There were payments made by the respondent from time to time towards the judgment debt which were duly noted in the particulars.

The respondent did not pay the sum demanded in the bankruptcy notice within the stipulated seven days ie, 12 November 1992, but, on 18 November 1992 the respondent made a part payment of RM126,700 to the appellant. On 16 February 1993 the appellant presented a creditor's petition against the respondent for failure to comply with the bankruptcy notice. The creditor's petition claimed a sum of RM5,513,465.61 being the amount outstanding as at 15 December 1992, after deducting the part-payment of RM126,700.

On 11 November 1993, the respondent made a further part-payment of RM504,816.20 (equivalent to US$200,000) to the appellant.

The respondent then filed a notice of intention to oppose petition dated 23 May 1994. The sole ground relied on by the respondent was that there had been a complete accord and satisfaction of the debt owed to appellant by his payment of RM504,816.20 (equivalent to US$200,000) on 11 November 1993.

The appellant denied that there was accord and satisfaction of the debt. The appellant further indicated that the appellant would hand over to the official assignee all monies on which the act of bankruptcy was committed.

1st Question

On the first question, the High Court held that interest claimed in the bankruptcy notice was time-barred as the total period for which interest was claimed exceeded six years. This is because the interest had been calculated from the date of commencement of interest as stipulated in the judgment ie, from 22 June 1986. The Court of Appeal, in dismissing the appeal, did not expressly decide on this point. The appeal was dismissed on the second issue only.

Before us, learned counsel for the appellant referred us to this court's judgment in *United Malayan Banking Corp. Bhd. v. Ernest Cheong Yong Yin* [2002] 2 CLJ 413 and submitted that as the bankruptcy notice was issued within six years from the date of the judgment, the interest claimed was not time-barred even though it included pre-judgment interest. In other words, the material date is the date of the judgment, not the date of commencement of interest. So long as the bankruptcy notice is filed within six years from the date of the judgment, the appellant is entitled to claim interest as stipulated in the judgment even though the date of the commencement of the interest was earlier.

The judgment of this court in *Malayan Banking Corp. Bhd. (supra)*, was delivered on 5 April 2002, more than a year before leave was granted in this case. In that case on 15 October 1987, the appellant had obtained summary judgment against the respondent for RM95,864.93 on an overdraft account

together with interest at 15% p.a. thereon with monthly rests from 1 April 1986 until full realisation, and for RM66,051.74 on overdue trust receipt account together with interest at 16% p.a. thereon until full settlement, and RM350 costs. On 24 January 1996, eight years and three months after the date of judgment, the appellant filed a bankruptcy notice against the judgment debtor amounting to RM229,563.68 including accrued interest thereon.

Abdul Malek Ahmad FCJ, delivering the judgment of the court, said, at p. 428 of the report:

> The Court of Appeal had decided that "the date on which the interest became due" was the date of the breach which would be before the judgment date. We are of the considered view that this finding is erroneous as the arrears of interest are in respect of a judgment debt, which as we have stated earlier is the principal sum and the prejudgment interest, and so the date on which the interest on the judgment debt became due must surely mean the judgment date.

Thus, it is clear that this court has, in *Malayan Banking Corporation Bhd*'s case *(supra)* decided that "the date on which the interest became due" is the judgment date. That is the answer to the first question. In this judgment I shall not say anything more about the other points decided in that case.

2nd Question

Regarding the second question, it is not disputed that US$200,000 (RM504,816.20) was paid by the respondent and accepted by the appellant and that the appellant undertook to pay it over to the official assignee. What was disputed was whether it was paid and received as a complete accord and satisfaction of the debt. Indeed that was the only ground for opposing the petition as contained in the affidavit of the respondent filed on the same date as the notice of intention to oppose the petition, ie, 23 May 1994.

The learned High Court judge held:

> ... no agreement was ever reached between the Debtor and the Petitioning Creditors to treat the payment of US$200,000.00 as a full and final settlement of the judgment debt. The Debtor's offer was never accepted by the Petitioning Creditors prior to the Debtor making the payment of US$200,000.00 …

In the Court of Appeal, learned counsel for the appellant complained that the learned High Court judge found for the respondent on the point without sufficient investigation of facts. That argument found favour with the Court of Appeal. That part of the judgment reads:

> The appellants complains that the learned judge found for the respondent on the point without sufficient investigation of facts. I think there is much force in this argument. There may or may not have been an accord and satisfaction as alleged by the respondent. It is an issue that called for resolution in other proceedings properly brought by the respondent. The judge ought not, in my view, have expressed any concluded view on this issue in the absence of cogent evidence.

However, whether the payment of US$200,000 is or is not a complete accord and satisfaction of the debt is not the issue in this court. The issue is whether the receipt of the payment by the appellant (which is not denied) amounts to an abuse of the bankruptcy jurisdiction of the High Court or, what is usually called "abuse of the process of the court". It must also be pointed out that the question, as posed to this court is not whether acceptance of part-payment nullifies the bankruptcy notice and/or petition. However, as decisions on this last-mentioned point are only at High Court level, perhaps I should take this opportunity to clarify the law.

In *Re Patel (a debtor)* [1986] 1 All ER 522, it was held that where a debt on which the bankruptcy petition was founded had by the date of the hearing of the petition been reduced by part-payment to less than the statutory minimum the court had no jurisdiction to make a receiving order. That is a very sensible judgment, because, if the debt at the time of making the receiving order, is less than the statutory minimum, then the bankruptcy court clearly has no jurisdiction to make the receiving orders. But, where the debt is above the statutory minimum, the court's jurisdiction is not ousted.

Malaysian courts have, on many occasions, followed *Re Patel (supra)* and took a similar view, ie, where after the filing of the creditor's petition the amount owing by the debtor is reduced, the petition is not bad as long as the amount remaining owing at the date of hearing of the petition is more than the statutory limit. See *Re Chong Ah Kwan Construction Co.* [1966] 2 MLJ 39; *Re Loh Kok Huah, ex p Ban Hin Lee Bank Bhd* [1991] 3 CLJ 1817; [1991] 3 CLJ (Rep) 183; *Re Ti Hock Soon* [1993] 1 CLJ 477; *Re Sharifah Mohsin, ex p Perwira Habib Bank Malaysia Bhd* [1994] 3 CLJ 373; *Re Fong Yuan Kwong, ex p Public Bank Bhd* [1996] 4 MLJ 42; *Re Darshan Singh a/l Atma Singh, ex parte OCBC Bank (Malaysia) Bhd.* [1996] MLJU LEXIS 1195; *Rozila binti Mohamed v. American Express (M) Sdn. Bhd.* [1999] MLJU LEXIS 959; *Dalam Perkara: Hussain bin Manaf Ex. Parte: Malayan Banking Berhad* [2001] MLJU LEXIS 781; *Re MSA Zachariah, Ex Parte Boon Siew Finance Bhd.* [1993] 3 CLJ 279.

I am also aware of the judgment of High Court, Ipoh (Azmi J, as then was) in *Re Saloma Co; Ex parte, Ipoh Radio Co.* [1963] 29 MLJ 46. In that case the judgment debtor sought to set aside a bankruptcy notice which had been served on him by way of substituted service. The service was deemed to take effect on 29 May 1962. However, on 12 May 1962 the judgment debtor had paid RM700 towards the judgment debt. The court held that the bankruptcy notice was defective.

In my view, that case is clearly distinguishable from the other cases mentioned earlier. It was an application to set aside the bankruptcy notice. Clearly, the amount stated in the bankruptcy was incorrect as the payment of RM700 had not been taken into account. Furthermore, from the judgment, we do not know how much the balance was. It could well be below the statutory minimum.

In any event I prefer the view that have been followed by the courts in this country, following *Re Patel (supra).*

On the question of abuse of the process of the court, this is what the Court of Appeal says:

> However, in the state of the evidence before him, the learned judge would have been perfectly entitled to dismiss the petition on the ground that it was an abuse of process. The appellant's own evidence warranted this. It is clear that the appellant had accepted payments from the respondent after commencing bankruptcy proceedings. The totality of the circumstances reasonably supports the inference that the appellant was using the bankruptcy court to extract payments from the respondent. That in my judgment amounts to an abuse of the bankruptcy jurisdiction of the High Court. The bankruptcy jurisdiction of the High Court is invoked on the ground that a debtor has committed an act of bankruptcy. The object of the exercise is to take the debtors financial affairs out of his hands and place them in the hands of the official assignee. It is certainly an abuse of process to use bankruptcy proceedings in the way of a judgment debtor summons to extract periodical payments from the debtor.

In considering the question of abuse of the process of court in bankruptcy proceedings, we must not lose sight of the reality in a debt recovery action. The intention of a creditor is to recover the debt. Towards that end, he files his claim and obtains judgment. Obtaining a judgment is not the end of the matter. A judgment is worthless if the debt is not recovered. So, the law provides ways to realise the judgment by way of execution proceedings. If the judgment debtor has assets, usually the judgment debtor would adopt one of the methods of execution proceedings. But, where the debtor, being an individual, has no assets, the judgment debtor, usually as a last resort, would

commence bankruptcy proceedings. It is only a natural process provided by law. When law provides various means of realising a judgment debt, the fact that a judgment debtor prefers one method over the others is within his legal right. Any judgment creditor would prefer to choose the most effective way of realising the judgment debt. That again is sensible. So, strong evidence of mala fide on the part of judgment creditor is required to prove abuse of process of court in bankruptcy proceedings. In this respect, perhaps it is easier to prove abuse of process of court in winding-up proceedings, in particular where no judgment has been obtained, the amount is small, the company is in a sound financial position, than in bankruptcy proceedings based on a judgment.

With that opening observation, let us look at the law in the context of bankruptcy proceedings.

Halsbury's Laws of England, 4th edn, vol. 3(2), para 185, under the heading of "Abuse of process" says:

> Where a petition is founded on a debt to which the petitioning creditor is not properly entitled, it may be dismissed as an abuse of process. This includes the situation where the presentation of a petition amounts to an attempt by the petitioning creditor, through the commencement of bankruptcy proceedings, to obtain the payment of money or other advantage to which he is not properly entitled. Such conduct on the part of the creditor is sometimes termed as "extortion".

In *Re A Debtor (No. 757 of 1954), Ex parte The Editor v. R.A. Damont, Ltd* [1955] 2 All ER 65 (CA), it was held:

> (a) there is no hard and fast rule that any arrangement or agreement made by a petitioning creditor with his debtor, after the institution or under the shadow of bankruptcy proceedings, whereby the creditor is able to get more than that "to which he was legally entitled" (that is, more than he could have recovered at law at the time of the bankruptcy proceedings being started or threatened) amounts to extortion in bankruptcy law, notwithstanding the absence of any mala fides or anything amounting to oppression in fact.
>
> (b) There is equally no rule that extortion has, in bankruptcy law, a special and artificial significance divorced altogether from the ordinary implication of the word.
>
> (c) The so-called "rule" in bankruptcy is no more than an application of a more general rule that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using

or threatening proceedings will be liable to be held guilty of abusing the process of the court and, therefore, disqualified from invoking the powers of the court by proceedings which he had abused.

(d) On the other hand the court will always look strictly at the conduct of a creditor using or threatening bankruptcy proceedings; and, if the court concludes that the creditor has used or threatened the proceedings at all oppressively (for example in order to obtain some payment or promise from the debtor or some other collateral advantage to himself properly attributable to the use of the threat), the court will not hesitate to declare the creditor's conduct extortionate and will not allow him to make use of the process which he has abused.

(e) In every case it is a question of fact in all the circumstances of the case whether there has been, in truth, extortion.

A good summary of the law on the issue is to be found in the judgment of the High Court of Australia in *Rozenbes & Others v. Kronhill & Another* 95 CLR 407 at p. 417. Citing *In re Majory* [1955] Ch.600 which was also reported as *Re a Debtor (supra)*, the judgment went on to say:

> There is an abuse of process if a pending bankruptcy petition, or a threat of proceedings in bankruptcy, is used as a means of extortion. The word "extortion" is not a technical term, and it has in bankruptcy law "no special and artificial significance divorced altogether from the ordinary implication of the word". The court will look strictly at the conduct of a creditor using or threatening bankruptcy proceedings, and extortion may be held to have taken place if the creditor has used, or attempted to use, a pending petition, or a threat of a petition; in order to extract from the debtor money which the debtor is not bound to pay, or in order to obtain some secret and unfair advantage over other creditors. But extortion will not be held to have taken place "in the absence of *mala fides* or anything amounting to oppression in fact". There must be a real intention on the part of the creditor to use the process for some other end than its legitimate end, and there must be a real exertion of pressure.

In the instant appeal, the only factor relied on by the respondent was that the appellant had accepted the payment of US$200,000 by the respondent. Even that payment, which the appellant insisted was a part-payment was made after the bankruptcy proceedings was commenced. There is no allegation that the appellant was using the bankruptcy proceedings as a means of obtaining payment of money to which the appellant was not entitled to or any evidence of fraud. As mentioned earlier, the only ground put up by the respondent to oppose the petition was that there was an accord and satisfaction. The

bankruptcy proceedings was filed by the appellant, as a judgment creditor, to recover the judgment debt owed to them. The fact that the respondent made the payment subsequent to the filing of the bankruptcy proceedings does not in any way tarnish the intention of the appellant in commencing the proceedings or even pursuing it as the appellant was of the view that it was only a part-payment of the judgment debt. Furthermore, the issue of abuse of process of the court was not raised by respondent in the High Court.

So, my answer to the second question is in the negative. Merely accepting payments in the course of bankruptcy proceedings does not render the proceedings an abuse of process, what more when the money is to be paid to the official assignee in the event the debtor is adjudicated bankrupt.

For the reasons above-stated, I would allow the appeal with costs. The order of the Court of Appeal dated 20 July 1999 is set aside. As only those two issues are before this court and, in my judgment, I have answered them both in favour of the appellant, I would make a receiving and adjudicating order against the respondent. The deposit is to be returned to the appellant. The sum of RM504,816.20 (equivalent to US$200,000) paid by the respondent to the appellant and the interests earned thereon is to be paid to the official assignee within two weeks of this order.